TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 405.

AMERICAN EXPRESS COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MAY 22, 1906.

(21,188.)

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INDEX.

	Original.	Print.
Caption	1	1
Placita	2	1
Petition	4	2
Answer	11	6
Stipulation of facts	20	12
Exhibit A—Articles of association and by-laws of the American Express Company (omitted in printing)	27	—
B—Annual card for 1906	54	16
C—Annual card for 1907	54	16
D—Stamp or paster book	54	16
E—Stamp or paster book	54	16
Replication	56	17
Opinion	57	17
Decree of April 24, 1908	72	31
Petition for appeal and assignment of errors	74	32
Order of April 24, 1908, allowing appeal	76	33
Appeal bond	77	33
Stipulation waiving citation	79	34
Clerk's certificate	80	35
Designation by counsel for appellant of parts of record to be omitted in printing and consent thereto	81	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1908.

1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Mr. Edwin W. Sims, United States Attorney for the Northern District of Illinois for United States of America.

Mr. Lewis Cass Ledyard, Mr. Lawrence Maxwell, Jr., Messrs. Winston, Payne, Strawn & Shaw, Solicitors for American Express Company.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois-Eastern Division, in Chancery sitting at the United States Court room, in the City of Chicago, in said District and Division before the Honorable Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Friday, the twenty-fourth day of April, in the year of our Lord, one thousand nine hundred and eight, being one of the days of the regular December term of said Court, begun Monday, the sixteenth day of December, 1907, and of our Independence the one hundred and thirty-second year.

H. S. STODDARD, *Clerk.*

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Be it remembered that on this day to-wit: the second day of July 1907, come the United States of America by Edwin W. Sims, United States Attorney for the Northern District of Illinois, by and under the direction of Honorable Charles J. Bonaparte, its Attorney General and filed in the clerk's office of said Court its certain Petition in the words and figures following to-wit:

4 *Petition.*

28728.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
v.
AMERICAN EXPRESS COMPANY.

Petition.

To the Honorable the Judges of the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division, sitting in Equity:

Your petitioner, the United States of America, by Edwin W. Sims, its attorney, for the Northern District of Illinois, acting by and under the direction of Honorable Charles J. Bonaparte, its Attorney General, brings this, its bill of complaint, against the American Express Company, a joint-stock association organized and existing under and by virtue of the laws of the State of New York, and, on information and belief, alleges and respectfully shows to your Honors:

First. That the said American Express Company for several months last past has been and now is engaged as a common carrier in the transportation of property by railroad in interstate commerce in the said United States, and during said time has been and now is subject to the provisions of the Act of Congress approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate Commerce," and also to the Act of Congress approved February nineteenth, nineteen hundred and three, entitled, "An Act to Further Regulate Commerce With Foreign Nations and Among the States," and also to all Acts of Congress amendatory of said Acts, including an act of Congress approved June twenty-ninth,
5 nineteen hundred and six and in force August twenty-eighth, nineteen hundred and six, entitled "An Act to amend an Act entitled 'An Act to regulate commerce' approved February fourth, eighteen hundred and eighty-seven and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Second. That since the taking effect of the Act approved June 29, 1906, the said American Express Company, as required by law, has kept open for public inspection in its several offices respectively its printed tariffs and schedules showing the rates and charges for the transportation of property, in the interstate commerce aforesaid, which the said common carrier established and which were then in force upon its several routes respectively and, as required by law, filed copies of such tariffs and schedules with the Interstate Commerce Commission of the said United States.

Third. That the said defendant common carrier, since the taking

effect of the said Act approved June 29, 1906, unlawfully has given and issued franks for the free transportation of property to

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

and since the taking effect of said Act, and while its said printed tariffs and schedules were in force and effect, as aforesaid, unlawfully has transported and forwarded upon such franks, shipments of property for the holders of such franks from points within one state of the said United States to points within other states of the said United States without demanding or receiving any payment or compensation for such transportation; and that the said defendant common carrier is now unlawfully transporting upon such franks in numerous instances and in large quantities and over all of its lines of transportation, shipments of property for the holders of such franks from points within one state of the said United States to points within other states of the said United States without demanding or receiving any payment or compensation for such transportation, and in so doing unlawfully has been granting and giving, and unlawfully is now granting and giving concessions and discriminations in respect to the transportation of said property in interstate commerce whereby such property, by the device of issuing and by the use of said franks, has been transported at a less rate than that named in the said tariffs and schedules of the said common carrier published and filed by such common carrier as aforesaid, in violation of the statute in such case made and provided.

Which said property so transported and forwarded on said franks as aforesaid consisted of personal effects, merchandise, live stock, household goods and other articles and commodities, then and there being the personal and private property of and belonging to said persons to whom said franks had been issued, and for whom such shipments had been made as aforesaid.

Fourth. That the said defendant common carrier having filed its printed tariffs and schedules and kept the same open for public inspection as aforesaid, from and since the taking effect of said Act approved June 29, 1906, by the device of issuing franks as aforesaid and by the free transportation of said property in interstate commerce upon such franks, as aforesaid, has charged demanded and collected and received from certain persons, to wit, from

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

a less compensation for services rendered in said transportation of said property than said company then and there charged, demanded, collected and received from other persons, to wit, from such other persons as then and there paid to said defendant common carrier the rates which had been lawfully filed with the Interstate Commerce Commission, as aforesaid, by the said defendant carrier, and which were then and there in force and effect, for doing for them a like and contemporaneous service in the transportation of a like kind of property and under substantially similar circum-
7 stances and conditions, in violation of the provisions of said Acts.

Fifth. That the said defendant common carrier having filed its printed tariffs and schedules and kept the same open for public inspection, as aforesaid, from and since the taking effect of said Act approved June 29, 1906, by the device of issuing franks as aforesaid, and by the free transportation of said property in interstate commerce on such franks, as aforesaid, has unlawfully made and given undue and unreasonable preference and advantage to certain persons, to wit,

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

to the undue and unreasonable prejudice and disadvantage of such persons as then and there paid the full and lawful rates which had been and were then and there published and filed with the Interstate Commerce Commission, as aforesaid, by the said defendant carrier, in violation of the provisions of said Act.

Sixth. That the said defendant common carrier, having filed its printed tariffs and schedules and kept them open for public inspection, as aforesaid, from and since the taking effect of said Act approved June 29, 1906, by the device of issuing franks, as aforesaid, and by the free transportation of said property in interstate commerce on such franks, as aforesaid, has unlawfully charged, demanded, collected and received a much less and different compensation for the transportation of property, as aforesaid, for

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

between the points named in such tariffs so filed, as aforesaid, than the rates and charges which were then and there specified in
8 the tariffs filed by said defendant carrier, as aforesaid, and in effect at the time of such transportation.

Seventh. That the said defendant common carrier having filed its

printed tariffs and schedules and kept them open for public inspection, as aforesaid, from and since the taking effect of the said Act approved June 29, 1906, by the device of issuing franks, as aforesaid, and by the free transportation of said property in interstate commerce on such franks, as aforesaid, unlawfully has willingly suffered and permitted certain persons, to wit,

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

to obtain transportation for property at less than the regular rates established and in force on the lines of the said defendant common carrier, in violation of said Acts to regulate Commerce.

Eighth. That the said defendant common carrier intends to and will continue unlawfully to issue such franks to the several classes of persons above described, and intends to and will continue to unlawfully transport property of the kind heretofore described in this petition upon such franks, without demanding or receiving any payment or compensation for such transportation of property from the holders of such franks, from points within one state of the said United States to points within other states of the said United States over and throughout all of its lines of transportation within the said United States, unless restrained by the injunction of this Honorable Court.

Petitioner therefore prays that said defendant may be required to make answer to this petition, but not under oath, the answer under oath being hereby waived.

Wherefore, may it please your Honors to forthwith grant a writ of injunction directed to the said defendant, its agents, attorneys and all other persons acting or claiming or assuming to act under its authority and any and all persons acting in combination
9 with them or either of them from continuing each and any of the said unlawful proceedings aforesaid and especially from issuing any franks for the free transportation of property to

(*a*) officials, agents, attorneys at law, and employés (and the families of each) of the said defendant carrier,

(*b*) officials and employés (and the families of each) of other express companies,

(*c*) officials and employés (and the families of each) of various railroad and other transportation companies,

or to any of said persons, and from transporting and forwarding upon such franks, as aforesaid, without demanding or receiving the lawful rate of payment therefor, shipments of property for the holders of such franks, as aforesaid, from points within one state of the said United States to points within other states of the said United States; and from transporting and forwarding any property by any device whatever, or in any manner whatever at a less rate than that

named in the said tariffs and schedules published and filed by the said defendant common carrier as is required by the said Act to regulate commerce and the acts amendatory thereof.

And may it please your Honors to grant such other and further relief as law or equity may require and to your Honors may seem meet.

And your petitioner prays that a writ of subpœna may issue to the said defendant, the American Express Company, requiring it, under penalty and at a time and place to be therein stated and charged, to appear and answer all and singular the matters hereinbefore stated and charged, and abide by and perform such orders as the Court may make in the premises.

And your petitioner will ever pray.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed Jul-2-1907 H. S. Stoddard, Clerk.

10 And on the same day to-wit: the second day of July, 1907, come the American Express Company by its solicitor and filed in the clerk's office of said Court its certain Answer to the Petition heretofore filed herein. Which said Answer is in the words and figures following to-wit:

11 *Answer.*

28728.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
v.
AMERICAN EXPRESS COMPANY.

The answer of the defendant the American Express Company to the Bill of Complaint filed herein by the United States of America, by Edwin W. Sims, its attorney for the Northern District of Illinois, acting by and under the direction of Honorable Charles J. Bonaparte, its Attorney General.

This defendant, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering saith:

First. This defendant admits that it has been for many years and now is engaged as a common carrier in forwarding property by railroad in interstate commerce in the United States, but denies that it has been or is engaged in the transportation of property by rail-

road except as such transportation is conducted by express companies as hereinafter set forth. It admits that since the taking effect of the Act of Congress approved June 29th, 1906, mentioned in said bill of complaint, it has been and now is subject to the provisions of the various Acts of Congress in that behalf mentioned and referred to in the First Article of said bill of complaint.

Second. This defendant admits that since the taking effect of the said Act approved June 29th, 1906, it has, as required
12 by law, kept open for public inspection in its several offices respectively its printed tariffs and schedules showing the rates and charges for the transportation of property in the interstate commerce aforesaid, which it established and which were then in force upon its several routes respectively, and, as required by law, filed copies of such tariffs and schedules with the Interstate Commerce Commission of the United States.

Third. This defendant admits that since the taking effect of the said Act approved June 29th, 1906, it has given and issued passes or franks for the transportation of certain classes of property to the several classes of persons mentioned in the Third Article of the said bill of complaint, but alleges that the passes or franks so issued to officials and employés of other express companies and of railroad and other transportation companies and their respective families, were issued only in exchange for like passes or franks issued to the officials and employés of the defendant by such express, railroad and other transportation companies, and this defendant denies that the giving or issuing of any of said passes of franks was in any wise unlawful; and while it admits that said passes and franks entitled the respective holders thereof to the transportation or forwarding of the property covered thereby, without any payment therefor in money, it denies that such transportation or forwarding was free.

This defendant further admits that since the taking effect of said Act, and while its said printed tariffs and schedules were in force and effect, it has transported or forwarded, upon such passes or franks, shipments of property for the holders of such passes or franks, from points within one state of the said United States to points within other states of the said United States, without demanding or receiving any payment or compensation for such transportation or forwarding other than the services rendered to this defendant by its own officials, agents, attorneys at law and employees, in the case of passes or franks issued to them, and other than said exchange of passes and franks in the case of passes or franks issued to the officials and em-
13 ployees of other express companies and railroad and other transportation companies, and this defendant denies that in issuing such passes or franks it has been granting or giving, or is now granting or giving, unlawful concessions or discriminations in respect of the transportation or forwarding of said property in interstate commerce, and this defendant denies that the issuing or use of said passes or franks was a device or intended as such, but alleges on the contrary that the said passes and franks were so issued by this defendant in the belief that its action was lawful and authorized by the Acts aforesaid. This defendant further admits that the property

so forwarded upon said passes or franks consisted of personal effects, being the personal and private property of and belonging to said persons to whom said passes and franks were issued, but denies that the same consisted of merchandise, live-stock, household goods and other articles and commodities.

Fourth. This defendant, denying, as it has heretofore denied, that the issuing of said passes or franks was a device, denies that by the issuing thereof or by the free transportation or forwarding of property thereon it has charged, demanded or collected or received from the persons to whom said passes or franks were issued a less compensation for services rendered in said transportation or forwarding of property than said company then and there charged, demanded, collected or received from other persons for doing for them a like and contemporaneous service in the transportation or forwarding of a like kind of property and under substantially similar circumstances and conditions.

Fifth. This defendant, denying, as it has heretofore denied, that the issuing of said passes or franks was a device, denies that by the issue thereof or by the transportation or forwarding of property in interstate commerce thereon it has unlawfully made or given any undue or unreasonable preference or advantage to the persons to whom said passes or franks were issued, to the undue or unreasonable prejudice or disadvantage of such persons as paid the rates
14 published and filed with the Interstate Commerce Commission by this defendant.

Sixth. This defendant, denying, as it has heretofore denied, that the issuing of said passes or franks constituted any device, admits that it has forwarded the property covered thereby in interstate commerce upon such passes or franks issued to the classes of persons above mentioned and without any payment or compensation therefor other than as above set forth, but denies that in so doing it has unlawfully charged, demanded, collected or received a less or different compensation for the transportation of property between the points named in such tariffs so filed than the rates and charges which were then and there specified in the tariffs filed by this defendant and in effect at the time of such transportation or forwarding.

Seventh. This defendant, denying, as it has heretofore denied, that the issue of such passes or franks constituted any device, and admitting, as it has heretofore admitted, that since the taking effect of said Act approved June 29th, 1906, it has forwarded upon such franks the personal effects of the various persons to whom the same were issued, as hereinbefore set forth, from one state to another state, denies that it has thereby unlawfully suffered or permitted said persons to obtain transportation for property at less than the regular rates established and in force on the lines of this defendant in violation of said Acts to regulate commerce.

Eighth. And this defendant, further answering, admits that it intends to and will continue to issue such passes or franks to the several classes of persons above described, and to transport or forward property covered thereby, without demanding or receiving any payment or compensation for such transportation or shipment from the

holders of such passes or franks, other than the compensation above mentioned, consisting of services and of the interchange of passes, from points within one state of the United States to points
15 within other states of the said United States and generally throughout its lines of transportation within the United States, unless restrained by the injunction of this Honorable Court, but it denies that said intention is in any wise unlawful.

Ninth. And further answering, this defendant alleges that it is an unincorporated association of individuals organized under a contract or articles of association or partnership, executed originally in the year 1850, renewed in the year 1859 and amended in the year 1868 upon the occasion of the merger with it of the Merchants Union Express Company, an organization of a similar character, similarly constituted.

That this defendant has never received any charter or franchise from the State and possesses only such powers as are or may be lawfully exercised by any body of individuals organized together for business purposes under the common law right of contract; that since the organization of this defendant it has continuously engaged in and prosecuted the various forms of business and enterprises set forth in its articles of association and is still engaged in the prosecution thereof; that among the forms of business thus carried on by the defendant is that generally known as the "express" business, which may be generally described as follows: the collecting at the respective residences or places of business of shippers and receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employees, and at destination personally delivering at the addresses of the respective consignees, packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, certificates of stock and other valuable papers, jewels silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, also parcels of goods, wares and merchandise requiring great dispatch or careful handling, also fruit, vegetables, fresh meats, fish, oysters, fish-spawn and other articles liable to decay or other injury
16 from delay; also live animals requiring particular care and attention during transportation; also receiving and forwarding bills, notes, drafts and accounts, and receiving and returning payment thereof; also receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to shipper; that this defendant does not own or control any means or instrumentalities of transportation, except the wagons used by it for collecting the goods of shippers at their residences or places of business and transporting the same to the stations or depots of the railroad or steamboat line where they are to be loaded upon the cars or boats, and for the removal of the same at destination from the cars or boats to the residences or places of business of consignees.

That the express business, as thus defined, is and always has been carried on under contracts made by the various express companies

with railroad and other transportation companies, which contracts in general provide for the furnishing by the railroad to the express company of facilities for the transaction of the express business over its lines, the transportation by the railroad company under the personal care of employees of the express company, upon passenger trains, of goods forwarded by the express company, the payment by the express company to the railroad company, as compensation for such facilities and service, of a certain percentage of the gross receipts of the express company derived from the business transported over the line of the railroad, and a covenant by the express company to supply under such contract and efficent express service upon all the lines of the railroad.

Under such contracts the American Express Company is, and for more than fifty years has been, engaged in carrying on the express business upon many lines of railroad, now amounting in the aggregate to some 40,000 miles of railway, including the Boston & Maine Railroad system, the New York Central system, the Chicago & Northwestern Railway, the Illinois Central, the Missouri, Kansas and Texas, and other lines.

That the business thus carried on embraces both local, or
17 domestic, and interstate business, a large part of it consisting of the receiving, forwarding and delivering of packages between points in different States. That for over fifty years it has been the general custom of express companies in this country and was the custom of this defendant to exchange with railroad companies and other carriers, passes for their respective officers, employees and their families, the railroad companies issuing passes for the transportation of such persons and their personal baggage and the express companies issuing passes or franks for the transportation or forwarding of the personal packages of the persons to whom the same were issued, and that for the same length of time it has been the general custom of all express companies, and was the custom of this defendant, to issue to its own officers, agents, attorneys at law, employees and their families, passes or franks for the transportation or forwarding of their personal packages by express. That the passes and franks so issued by this defendant in conformity with said custom applied to no other property or merchandise than the personal parcels of the holder, and in particular did not apply to any shipments of extra heavy weight, money, bonds, jewelry, live-stock or business packages.

That the express companies were first subjected to the provisions of the Interstate Commerce Act by the Act aforesaid of June 29th, 1906, and that upon the taking effect of said Act this defendant duly filed and published the schedules of rates required by the Interstate Commerce Act; that forthwith upon the passage of the said Act this defendant withdrew all outstanding passes issued by it to others than persons belonging to the particular classes hereinafter specified, leaving in force only the following, namely:

a. Passes issued to officials, agents, attorneys at law and employees (and their families) of this Company.

b. To officials and employees (and their families) of railroad companies, express companies and other transportation companies

in exchange for passes for personal transportation and the transportation of personal baggage issued to the officers and employees of the defendant company by such other common carriers.

c. To ministers of religion.

18 and that since the taking effect of the said Act of June 29th, 1906, this defendant has forwarded upon such passes or franks, without demanding or receiving any payment therefor, shipments of personal packages by the holders of such passes or franks, from points within one state of the United States to points within other states of said United States.

And this defendant alleges that it is advised by counsel and verily believes that it was not the intention or effect of the Interstate Commerce Act or the various Acts amendatory thereof to forbid the issuance by express companies of passes or franks to persons of the classes above mentioned, that the issuance of such passes or franks was not within the evils sought to be remedied or corrected by said Acts and that this defendant had full right and authority under said Acts to issue the said passes or franks and to forward from points in one state to points in other states the personal packages of the holders thereof under the provisions of the said Acts.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith *he* is by the said bill charged, without this, that there is any other matter, cause or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges, in this behalf most wrongfully sustained.

AMERICAN EXPRESS CO.,
By LEWIS CASS LEDYARD AND
WINSTON, PAYNE, STRAWN & SHAW,
Its Solicitors.

LAWRENCE MAXWELL,
Of Counsel.

(Endorsed:) Filed Jul. 2, 1907. H. S. Stoddard, Clerk.

19 And on the same day to-wit: the second day of July, 1907, come the parties in said entitled cause by their solicitors and filed in the clerk's office of said Court a certain Stipulation of Facts. Which said Stipulation of Facts together with the exhibits thereto attached is in the words and figures following to-wit:

20 *Stipulation of Facts.*

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Subject to any objection by either party as to competency, materiality or relevancy, it is stipulated for the purposes of this suit that the following facts are true:

The American Express Company is an unincorporated association of individuals, organized under a contract or articles of association or partnership, executed originally in 1850, renewed in 1859, and amended in 1868 upon the occasion of the merger with it of the Merchants Union Express Company, an organization of a similar character, similarly constituted.

A copy of the articles of association and merger of 1868, as amended up to the present time, is hereto annexed, marked Exhibit "A."

The Company has never received any charter or franchise from the State.

Since its formation the Company has continuously engaged in and prosecuted the various forms of business and enterprises set forth in said articles and is still engaged in the prosecution thereof.

Among the forms of business thus carried on by the defendant is that generally known as the "express" business, which may be generally described as follows: The collecting at the respective residences or places of business of shippers, and receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employés, and at destination personally delivering at the ad-

21 dresses of the respective consignees, packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, certificates of stock and other valuable papers, jewels, silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, also parcels of goods, wares and merchandise requiring great despatch or careful handling; also fruit, vegetables, fresh meats, fish, oysters, fish spawn and other articles liable to decay or other injury from delay; also live animals requiring particular care and attention during transportation; also receiving and forwarding bills, notes, drafts and accounts, and receiving and returning payment thereof; also receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to shipper.

The kinds and classes of property thus forwarded by the express companies, as common carriers for the public generally, include the kinds and classes of property named in the cards, stamps and pasters hereinafter set forth, but do not ordinarily include such articles as, by reason of their bulk or weight, are ordinarily shipped as freight, such as hay, grain, steel rails and the like.

The Company does not own, directly or indirectly, any means or instrumentalities of transportation, except the wagons used by it for collecting the goods of shippers at their residences or places of business and transporting the same to the stations or depots of the railroad or steamboat line where they are to be loaded upon the cars or boats, and for the removal of the same at destination from the cars or boats to the residences or places of business of consignees.

The express business is, and always has been, carried on under contracts made by the express companies with railroad and other transportation companies, which contracts in general provide for the furnishing by the railroad to the express company of facilities for the transaction of the express business over its line, the
21½ transportation by the railroad company, under the personal care of employés of the express company, upon passenger trains (or in some instances upon special trains made up exclusively of cars for express matter) of goods forwarded by the express company, the payment by the express company to the railroad company, as compensation for such facilities and service, of a certain percentage of the gross receipts of the express company derived from the business transported over the line of the railroad, and a covenant by the express company to supply, under such contract, an efficient express service upon all the lines of the railroad.

Under such contracts the American Express Company is, and for many years has been, engaged in carrying on the express business upon many lines of railroad, amounting in the aggregate to some 40,000 miles of road, including the Boston & Maine System, the New York Central System, the Chicago & Northwestern Railway, the Illinois Central, the Missouri, Kansas & Texas, and other lines.

The business thus carried on embraces both local, or domestic, and interstate business. A large part of it consists of the receiving, forwarding and delivering of packages between points in different states.

For many years a custom has existed under which express companies have issued to the officers and employés and their families of the respective railroad companies and other carriers, cards, stamps and pasters of the kinds and substantially in the forms hereinafter set forth, and in return therefor the railroad companies and other carriers have issued to the respective officers and employés and their families of the express companies passes entitling the respective holders thereof to free transportation as passengers over the lines of the carriers issuing them (such free transportation including, in connection therewith and as incidental thereto, the transportation of the passenger's baggage in limited quantities). The express companies have also exchanged with each other cards, stamps and
22 pasters of the kinds hereinafter set forth for their officers and employés and their families. The cards, stamps and

pasters thus issued by the American Express Company were of two general classes, namely, those which continued in force for all shipments coming within their terms during the year for which they were issued, and those which were good only for the particular shipment to which they were attached, the latter being in the form of a stamp or paster to be affixed upon the parcel forwarded.

For many years, also, it has been the custom for express companies to issue to their own officers, agents, attorneys at law, employés and their families, cards, stamps or pasters of both classes above mentioned.

The annual cards so issued by the American Express Company, to wit, those belonging to the first class above mentioned, in conformity with such custom, were in the form hereto annexed, marked Exhibit "B". The stamps or pasters good only for the particular shipment to which they were attached, were in the form hereto annexed marked Exhibits D. and E.

Upon the passage and taking effect of the Act to amend the Interstate Commerce Act, commonly called the Hepburn Act, the American Express Company duly filed schedules of rates mentioned in said Act.

It also issued, through the President's office, the following official instructions to all subordinate officers and employés, dated October 1, 1906:

"*Card Franks and Stamp Passes.*—The present authorized Franks and Passes of the Company, are the Red (Unlimited as to weight) Franks and Passes, and Blue (limited to 20 lbs.) Passes, and Agents must recognize no other form.

Until the Courts or the Interstate Commerce Commission have determined the extent to which the provisions of the Interstate Commerce Law relating to the interstate transportation of property at free or reduced rates are to be applied to such shipments transported by Express Companies, Annual Card Franks or Stamp Passes of this Company covering the free interstate transportation of
23 property over this Company's lines, will be limited to the following:

1. To officials and employés (and their families) of this Company.

2. To officials and employés (and their families) of Railroad Companies, Express Companies and other transportation companies which are authorized, under the law, to exchange Passes with other Common Carriers.

3. To ministers of Religion.

Annual Card Franks for 1906 covering free transportation of interstate shipments issued other than as above have been withdrawn.

Card Franks in the hands of persons entitled thereto, will be recognized for the current year, subject to the following conditions printed thereon, which must be complied with:

"This Company will transport free of charge over its lines in the United States and Canada, the personal parcels of the holder.

"This Frank does not apply to shipments of extra heavy weight,

money, bonds, jewelry, live stock or business packages, and is not transferable.

"The person accepting this Frank assumes all risk of loss or damage to property carried under the same, and expressly agrees that this Company is not to be held liable under any circumstances.

"If charges are collected upon packages which were entitled to free transportation under this Frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

"The holder of this Frank is requested to present the same with shipment when made, or, if not practicable to do so, to mark on face of package "Free Frank No. —," adding his signature.

24 "If used at other than place where holder resides, the Frank must be presented with shipment."

The free transportation of any property for shippers is prohibited."

In its official Circular of January 2, 1907, these instructions were confirmed by the following:

"Until the Courts or the Interstate Commerce Commission have determined the extent to which the provisions of the Interstate Commerce Law relating to the transportation of property at free or reduced rates are to be applied to such shipments transported by Express Companies, Annual Card Franks or Stamp Passes of this Company covering the free transportation of property over this Company's lines, will be limited to the following:

1. To officials and employés (and their families) of this Company.

2. To officials and employés (and their families) of Railroad Companies, Express Companies and other transportation Companies which are authorized, under the law, to exchange Passes with other Common Carriers.

3. To ministers of Religion.

Card Franks and Stamp Passes.—The present authorized Franks and Passes of the Company, are the Red (unlimited as to weight) Franks and Passes, and Blue (limited to 20 lbs.) Passes, and Agents must recognize no other form.

Card Franks for 1906 have expired by limitation, and Agents will discontinue receiving or delivering shipments free thereunder.

Card Franks for 1907 have been issued to persons entitled thereto, and will be recognized for the current year, subject to the following conditions printed thereon, which must be complied with:

25 "This Company will transport free of charge over its lines in the United States and Canada, the personal parcels of the holder.

'This Frank does not apply to shipments of extra heavy weight, money, bonds, jewelry, live stock or business packages, and is not transferable.

'The person accepting this Frank assumes all risk of loss or damage to property carried under the same, and expressly agrees that this Company is not to be held liable under any circumstances.

'If charges are collected upon packages which were entitled to free transportation under this frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

'The holder of this Frank is requested to present the same with

shipment when made, or if not practicable to do so, to mark on face of package 'Free Frank No. —' adding his signature.

'If used at other than place where holder resides, the Frank must be presented with shipment.'

The free transportation of any property for shippers is prohibited."

Ever since the taking effect of the Hepburn Act, the American Express Company has continued to issue cards, stamps and pasters of the forms herein set forth, to the several classes of persons described below, to-wit:

1. To officials, agents, attorneys at law, and employés (and their families) of this Company.

2. To officials and employés (and their families) of Railroad Companies, Express Companies and other transportation companies, in exchange for passes and franks of such other common carriers.

3. To ministers of Religion.

and has transported and forwarded upon such cards, stamps and pasters, without demanding or receiving any payment therefor, shipments of property of the kinds and classes described therein, from points within one state to points within other states.

26–53

Exhibit C, hereto annexed, is an example of the form of the annual cards so issued and used since January 1, 1907.

Exhibits D and E, hereto annexed, are examples of the stamps or pasters so issued and used both before and since the passage of the Hepburn Act.

It is further stipulated that either party hereto may have the right to produce at the hearing such evidence, in addition to the facts above stipulated, and not inconsistent therewith, as it may see fit.

EDWIN W. SIMS, *U. S. Attorney.*
AMERICAN EXPRESS CO.,
By LEWIS CASS LEDYARD AND
WINSTON, PAYNE, STRAWN & SHAW,
Its Solicitors.

LAWRENCE MAXWELL,
Of Counsel.

(Here follow facsimiles of Exhibits B, C, D, and E, marked p. 54.)

* * * * * * *

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Exhibit C.

American Express Company

Will transport free of charge over its lines in the United States and Canada during the year 1907 the personal parcels of

No. 2705 [illegible]

Subject to conditions named hereon.

[illegible] President.

This Frank does not apply to shipments of extra heavy weight, money, bonds, jewelry, live stock or business packages and is not transferable.

The person accepting this Frank assumes all risk of loss, or damage to property carried under the same and expressly agrees that this Company is not to be held liable under any circumstances.

If charges are collected upon packages which were entitled to free transportation under this Frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

The holder of this Frank is requested to present the same with shipment when made, or if not practicable to do so, to mark on face of package "Free Frank No." adding his signature.

If used at other than place where holder resides the Frank must be presented with shipment.

Issued by [illegible]

Exhibit B.

American Express Company

Will transport free of charge over its lines in the United States and Canada during the year 1908 the personal parcels of

No. 3742 [illegible]

Subject to conditions named hereon.

[illegible] President.

This Frank does not apply to shipments of extra heavy weight, money, bonds, jewelry, live stock or business packages and is not transferable.

The person accepting this Frank assumes all risk of loss, or damage to property carried under the same and expressly agrees that this Company is not to be held liable under any circumstances.

If charges are collected upon packages which were entitled to free transportation under this Frank, the Company's Agent will, when requested, refund same on presentation of the Frank.

The holder of this Frank is requested to present the same with shipment when made, or if not practicable to do so, to mark on face of package "Free Frank No." adding his signature.

If used at other than place where holder resides the Frank must be presented with shipment.

Issued by [illegible]

Date Issued _____ 190__

To Whom _____

On Account of _____

Addressed to _____

_____

Weight _____ lbs. Charges, if collected, $ _____

AMERICAN EX. CO. No. 14559

(5037, Oct., 1905.)

AMERICAN EXPRESS CO.

AT OWNER'S RISK of loss or damage to the property carried, will

PASS Package addressed

M _____

_____

Countersigned by _____

Stamp void and shipment subject to regular charges if addressed otherwise than as above.

No. 14559

PRESIDENT.

INSTRUCTIONS.

Stamp Passes for use of parties who are entitled to the Company's services free of charge are to be used only for **business forwarded**, and **must not be used in lieu of refused vouchers**, for deduction of such charges on business received.

Each pass and stub of same must, before issue, be properly filled out by Official issuing same. Such Official must ask for what purpose and address the pass is to be used, and must write the address on the face of stamp before it leaves his hands.

Under no circumstances must books of stamps be issued to outside parties for use as occasion requires.

When a new supply of passes is required, the cover and stubs of each book of used stamps must be sent to the Superintendent of the Division furnishing same.

Matter carried under these Passes is subject to the following **terms and conditions, notice of which must be given to the person to whom stamp is issued:**

This Pass does **not** apply to shipments of **EXTRA HEAVY WEIGHT, money, bonds, jewelry, live stock, or business packages,** and is **not transferable.**

The person accepting this Pass assumes all risk of loss or damage to property carried under the same and **expressly agrees that this Company is not to be held liable under any circumstances.**

Passes must not be used for shipments, the weights of which exceed the limit named on face of stamp.

If passes are used upon packages not addressed in accordance with the reading of same, regular charges will be made and collected upon shipment.

Date Issued _____ 190__

To Whom _____

On Account of _____

Addressed to _____

_____

Weight _____ lbs. Charges, if collected, $ _____

AMERICAN EX. CO. No. 246 12 26

(5085, Oct., 1905.)

AMERICAN EXPRESS CO.

AT OWNER'S RISK of loss or damage to the property carried, will

PASS Package not exceeding 20 pounds, addressed

M _____

_____

Countersigned by _____

Stamp void and shipment subject to regular charges if addressed otherwise than as above.

No. 246 12 26

PRESIDENT.

INSTRUCTIONS.

Stamp Passes for use of parties who are entitled to the Company's services free of charge are to be used only for **business forwarded**, and **must not be used in lieu of refund vouchers**, for deduction of such charges on business received.

Each pass and stub of same must, before issue, be properly filled out by Official issuing same. Such Official must ask for what purpose and address the pass is to be used, and must write the address on the face of stamp before it leaves his hands.

Under no circumstances must books of stamps be issued to outside parties for use as occasion requires.

When a new supply of passes is required, the cover and stubs of each book of used stamps must be sent to the Superintendent of the Division furnishing same.

Matter carried under these Passes is subject to the following **terms and conditions, notice of which must be given to the person to whom stamp is issued:**

This Pass does **not** apply to shipments of EXTRA HEAVY WEIGHT, **money, bonds, jewelry, live stock, or business packages,** and is **not transferable.**

The person accepting this Pass assumes all risk of loss or **damage** to property carried under the same and **expressly agrees that this Company is not to be held liable under any circumstances.**

Passes must **not be used for shipments, the weights of which exceed the limit named on face of stamp.**

If passes are used upon packages not addressed in accordance with the reading of same, regular charges will be made and collected upon shipment.

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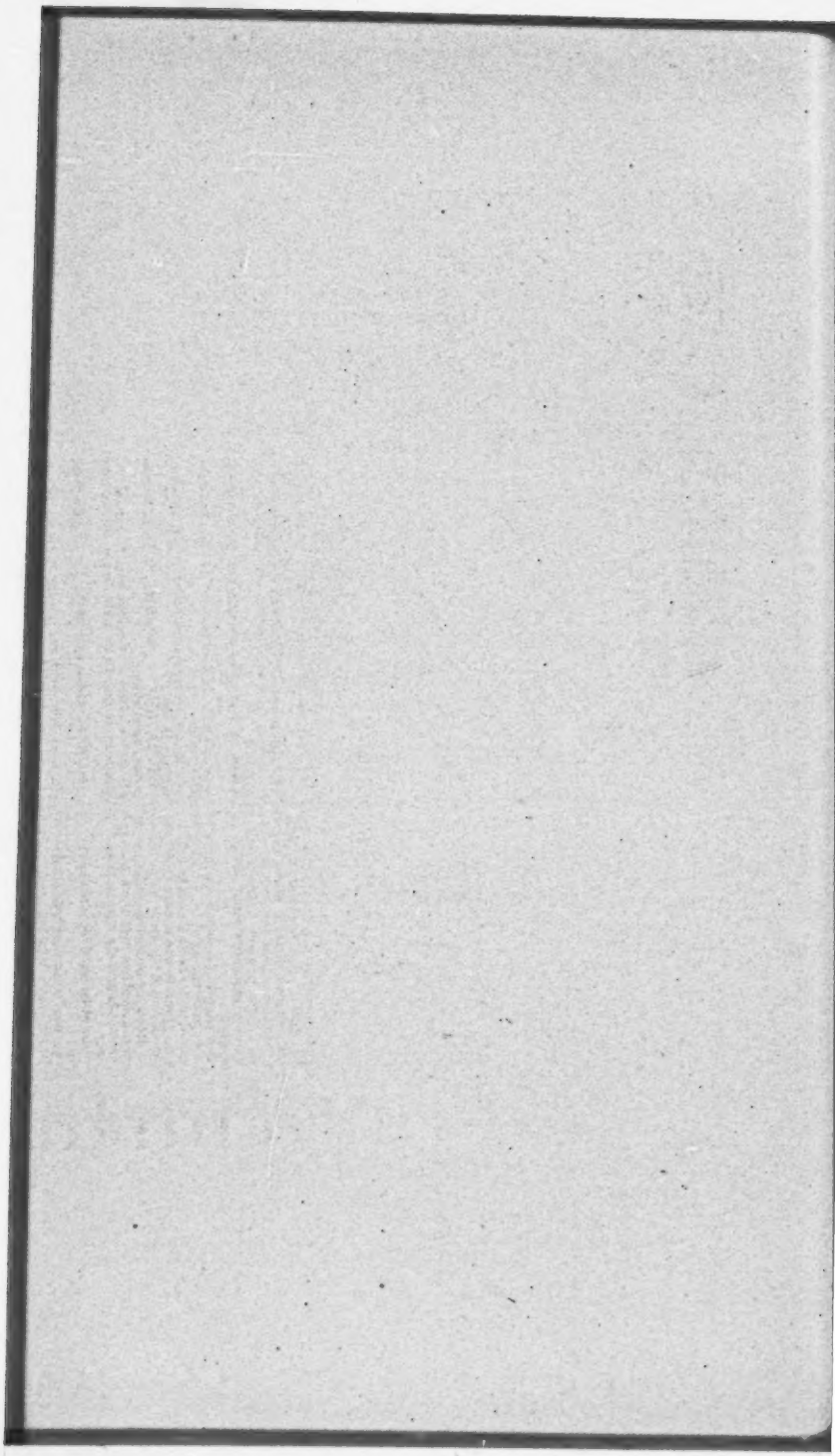


54 (Endorsed:) Filed July 2, 1907. H. S. Stoddard, Clerk.

55 And afterwards to-wit: on the third day of July, 1907, come the United States of America by Edwin W. Sims, United States Attorney for the Northern District of Illinois and filed in the Clerk's office of said Court its certain Replication in the words and figures following to-wit:

56 *Replication.*

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 28728.

UNITED STATES OF AMERICA
v.
AMERICAN EXPRESS COMPANY.

Replication.

This replicant, the United States of America, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, American Express Company, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed Jul- 3, 1907. H. S. Stoddard, Clerk.

57 And on to-wit: the twenty-fourth day of April, 1908, there was filed in the clerk's office of said Court in said entitled cause a certain Opinion by Judge Kohlsaat, in words and figures following to-wit:

57½ Opinion.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA

v.

UNITED STATES EXPRESS COMPANY; NATIONAL EXPRESS COMPANY; AMERICAN EXPRESS COMPANY; WELLS FARGO AND COMPANY EXPRESS, and ADAMS EXPRESS COMPANY.

On Petitions to Restrain Violations of the Interstate Commerce Law.

On Final Hearing.

(*Syllabus by the Court.*)

1. The Government by this action seeks to restrain the express companies from issuing franks to any officer, agent, attorney, or employee of itself, or other express company, and of any railroad company, and to the respective families of said several persons, and from transporting, without demanding full rate of payment therefor as published, any property of any of said persons from a point in one State to a point in another State. Defendants admit the granting of free transportation substantially as charged, and raise the issue that such practice is not contrary to law. *Held*, That the acts described in the pleadings do not come within the excepted classes, and are therefore in violation of the law.
2. The term "discrimination" in the amended section 1 of the Elkins Act includes unjust discrimination, as that is not within the statute which is not unjust or unfair.
3. The words "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions" as contained in section 2 of the act to regulate commerce relate to the carriage of goods and not to the person or capacity of the sender or receiver.
4. Defendants' contention that gratuitous transportation is not commerce is not tenable. The statute applies to all acts which
58 directly or indirectly affect interstate commerce, and it can not rest in the volition of the carrier by departing from the published schedules in arbitrary cases, to create a privileged class to which it may with impunity extend discriminating rates. There can be no doubt that it is clearly within the power of Congress to legislate upon free transportation in interstate commerce and to include the free carriage of goods by an express company among those acts which are prohibited by the act to regulate commerce.

5. The claim on the part of defendants that the granting of the free carriage set out in the pleadings contributes materially toward making its service attractive to employees, resulting in better transportation facilities to the public, and therefore not within the act, even if true, is beside the question before the court. Whether or not a construction of a statute would work inconvenience or affect the efficiency of the thing legislated upon is of no moment, provided Congress has the power to legislate upon the subject-matter.
6. There is no reason for assuming that Congress intended to give other meaning to the term "pass" than those in common acceptation, and "pass" as used in section 1 of the act as amended does not include the "franks" in question.
7. There is nothing in section 22 of the act to regulate commerce to the effect that Congress intended that the excepted persons and property are not to be considered within the statute. *I. C. C. v. B. & O. R. R. Co.*, 145 U. S., 263, distinguished.
8. Recent amendments to the act to regulate commerce contemplate a more effectual enforcement of that statute. The requirements are made more specific, the prohibitions more emphatic, and greater vitality is infused into the act.

Edwin W. Sims, United States attorney, and *James H. Wilkerson*, special assistant United States attorney, for the United States.

Frank H. Platt and *Winston, Payne, Strawn & Shaw* for United States Express Company.

Lewis Cass Ledyard and *Winston, Payne, Strawn & Shaw* (*Lawrence Maxwell* of counsel) for National Express Company and American Express Company.

W. W. Green and *Holt, Wheeler & Sidley* for Wells, Fargo and Company Express.

Cravath, Henderson & De Gersdorff and *Winston, Payne, Strawn & Shaw* (*Lawrence Maxwell* of counsel) for Adams Express Company.

(April 22, 1908.)

Opinion of the Court.

KOHLSAAT, *Circuit Judge:*

The Government files its petition herein under the provisions of section 3 of "an act to further regulate commerce with foreign nations and among the states," approved February 19, 1903,
59 to restrain defendant from issuing franks to any officer, agent, attorney, or employee of itself, or other express companies, and of any railroad company, and to the respective families of said several persons, and from transporting, without demanding full rate of payment therefor as published, any property of any of said persons from a point in one state to a point in another state.

Defendant has answered and the facts have been stipulated, admitting the granting of free transportation of property substantially

as charged. The issue is squarely made upon the law, and the cause is now before the court on final hearing.

Those portions of the statutes of the United States involved in this proceeding are:

First. That part of section 1 of the Interstate Commerce Act of February 4, 1887, as amended June 29, 1906, which reads as follows:

No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion * * *: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in the case of general epidemic, pestilence, or other calamitous visitation.

Second. That portion of section 2 of said act of February 4, 1887, which reads as follows:

That if any common carrier subject to the provisions of this act shall * * * collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Third. That part of section 3 of the same act, which reads as follows:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Fourth. That part of section 6 of said act, as amended by the act of June 29, 1906, which reads as follows:

Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff.

Fifth. Section 22:

That nothing in this act shall prevent the carriage, storage, or handling of property free, or at reduced rates for the United States, State, or municipal governments. * * *; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees.

Sixth. That part of section 1 of the act of February 19, 1903, known as the Elkins Act, as amended June 29, 1906, which reads as follows:

The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

* * * * * * *

Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate, as against such carriers, its officers or agents, or any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Seventh. By the act of June 29, 1906, it was provided:

The term "common carrier" as used in this Act shall include express companies and sleeping-car companies.

It is contended by complainant that said acts of defendant in transporting property for the above persons without charge: First, constitute unjust discrimination under sections 2 and 3 of the act of 1887; second, constitute a charge of less than schedule rates under section 6 of the act of 1887, as amended June 29, 1906; third, violate the Elkins law of 1903, as amended June 29, 1906, in the matter of discrimination and variance from Schedules. (The language of this clause of the Elkins Act last referred to is substantially unchanged by the amendment.)

61 For defendant it is claimed: First, that such acts were concededly lawful prior to the amendment of June 29, 1906;

second, that such acts do not fall within the prohibition of the act as it now stands; third, that said acts do not come within the meaning of "commerce" as used in the act; fourth, that express companies come within the exceptions of the act as amended June 29, 1906.

Prior to the amendment of June 29, 1906, express companies were not specifically subject to the terms of the interstate commerce act and the several amendments thereto as common carriers. Since that date hitherto, they stand with reference to the act and the several amendments thereto as though they had been named in the original act of 1887. They are in no respect in an attitude different from that of a railroad, save in so far as the language of the act necessarily excludes them. It may be conceded for the purposes of this hearing that the acts complained of were lawful prior to the passage of the said amendment of June 29, 1906. Since that amendment, said transactions, so far as they contravene the provisions of said act are unlawful. These may be stated briefly as follows: (1) the provisions of sections 2 and 3 against unjust and unreasonable discrimination in the transportation of persons or property; (2) said amended section 6, prohibiting the taking of any greater or less sum for transportation of passengers or property than that named in the tariffs filed, and (3) said section 1 of the Elkins Act, as amended, making it unlawful to offer or accept any rebate from the published rate, or other discrimination in respect of the transportation of any property whereby any advantage is given.

Amended section 1 of the so-called Elkins Act differs from sections 2 and 3 of the original act, among other matters, in this, that the word "discrimination" is used in the former without any qualifying adjective, as "unjust," etc. It is contended by the Government that this omission discloses the intention of the part of Congress, "to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute." It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the terms, discrimination, prejudice, or disadvantage as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in those cases. Webster defines the word "discrimination," with reference to railroads, as "the arbitrary imposition of unequal tariff for substantially the same service," investing it with the sense of unjustness and unfairness.

62 So far as appears, the Supreme Court has not had its attention called to the change, and has given it no construction. In *Platt v. LeCocq*, 150 Fed. Rep., 391, the words "prejudice and disadvantage" of the South Dakota statute were construed to mean unreasonable prejudice or disadvantage. In view of these considerations, and bearing in mind the general trend of the statute and amendments thereof, there seems to be no sufficient basis for the construction of the Elkins Act asked for by the Government in that

respect. It is, however, evident that the passage of the acts of 1903 and 1906 contemplated a more effectual enforcement of the statute. The requirements are made more specific and the prohibitions more emphatic, and, as if to make an end of the violations theretofore winked at, it was declared in 1906 that free transportation of persons except in certain specifically named instances should not be granted after January 1, 1907.

As above said, the Government insists that under these statutes as amended, it is the duty of common carriers to file and publish their tariffs (except as to those instances specifically named in section 22) and having so done, to charge the rate to everyone, including those named in the pleadings; that the "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," of section 2 "relates to the carriage of goods and not to the person of the sender or consignee" citing *Great Western R. R. Co. v. Sutton*, L. R. 4 H. L., 226, and *Denaby Main Collier Co. v. Manchester Railway Co.*, 11 Appeal Cases, 97. In the latter case, Lord Chief Justice Blackburn said:

I think it finally settled * * * that for passing over the same portion of the railway, the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances" and that the circumstances are those relating to the carriage of goods and not to the person of the sender.

The portion of sections 2 and 3 which refer to unjust discrimination and undue and unreasonable preference are modeled from the English tariff act and the construction placed thereon by the English courts is deemed, to say the least, very persuasive. *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S., 263; *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 168 U. S., 144; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S., 197.

The Interstate Commerce Commission (5 I. C. C. Rep., 69, 77, and 81) has construed section 2 as follows:

Without further citation of authority, the construction we give to section 2 of the act to regulate commerce is that where the service by the carrier subject to the act is "like and contemporaneous" for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22; and that where the traffic is "under substantially similar circumstances and conditions" in other respects, it is not rendered dissimilar within the meaning of the statute by the fact that such passengers hold unlike or, as sometimes termed, unequal official, social, or business positions, or belong to different classes as they ordinarily exist in a community, or are arbitrarily created by the carrier.

63

Therefore, it seems clear that the court should, on the facts of the case, consider the language above quoted from section 2, as referring to the carriage of goods and not as applying to the person or capacity of the sender or receiver. It is further contended for complainant

that the free carriage of property not excepted in section 22, by defendant, for the classes of persons described in the pleadings, while at the same time the filed and published rate for that same service is charged against the general public, constitutes *per se* discrimination within the meaning of the statute. As above stated, the term "discrimination" includes unjust discrimination, and that is not within the statute which is not unjust or unfair. "The spirit as well as the letter of a statute," says the Supreme Court in *Durousseau v. United States*, 6 Cranch., 307, "must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." To the same effect are *The Paquete Habana*, 175 U. S., 677, and *Glover v. United States*, 164 U. S., 294.

Mr. Justice Brown, speaking for the Supreme Court in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S., 263, affirming the ruling of the lower court (43 Fed., 37), says:

The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State or municipal governments, etc.

The section stands, with regard to the transportation of property as originally passed, except as it may be deemed to have been modified by the language of amended section 1 of the Elkins Act (1903), and the more stringent requirements of amended section 6, with regard to the filing, publishing of, and adherence to the schedule of rates.

In the group of cases known as the *Express Cases*, 117 U. S., 1, it was held that railroads were not as to express companies common carriers. This was later approved in *Railway Co. v. Voight*, 176 U. S., 498. In *United States v. C. & N. W. Ry. Co.*, 127
64 Fed. Rep., 785, decided in 1904, the circuit court of appeals for the seventh circuit held that the granting of a party rate to theatrical, musical, and other enterprises, and withholding it from the Government for the transportation of soldiers did not come within the prohibition of the act.

In *Northern Pacific Railway Co. v. Adams*, 192 U. S., 440, and in numerous other cases the courts have held that in transporting an employee of another railroad upon a pass, the company did not stand in the attitude of a common carrier for hire to such person. The jurisdiction of Congress to legislate upon the subjects of car equipment and employers' liability was sustained by the Supreme Court in *Johnson v. R. R. Co.*, 196 U. S., 1, and *Howard v. Illinois Central R. R.*, decided January 6, 1908, upon the ground that the subject-matter had reference to commerce. "Manifestly," says the court in

Adair v. U. S., decided January 27, 1908, "any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated."

Relying upon the doctrine of these decisions, defendant takes the position that gratuitous transportation is not commerce because it lacks the essential idea of traffic. The statute is not a police regulation, it says, nor one dealing with questions of public policy and defendant's acts here involved must be held to transgress the statute only in so far as they are inimical to or influencing commerce.

In respect, however, to the classes not connected with trade or commerce in any manner [say its solicitors] with whom the carrier has no dealings in its common and accepted relation to the public, we contend that gratuitous service is not commerce in any sense of the term, and not forbidden either by the letter or the spirit of the interstate commerce act. The circumstances and conditions surrounding such service are so entirely removed from and unlike the conditions upon which the carrier serves the public, that no comparison can be made between the two to support a charge of unjust discrimination or undue preference. (Defendant's brief p. 12.)

It may be as stated that as to persons and matters *in no way connected with trade or commerce,* the granting of gratuitous carriage would not constitute discrimination or undue preference. If, however, the transaction is within the domain of interstate commerce, it can not be said to be in no way connected with commerce.

Speaking for the Supreme Court in the so-called *Employers' Liability Cases,* 207 U. S., 495, 497, it is said by Mr. Justice White:

From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines,
65 carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that anyone who conducts such business be a "common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they

engage in interstate commerce and does not alone regulate the business of interstate commerce.

In *New Haven R. R. v. Interstate Commerce Commission,* 200 U. S., 391, the court says:

It can not be challenged that the great purpose of the act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.

Mr. Justice Day, speaking for the court in *Armour Packing Co. v. United States,* decided March 16, 1908, says:

But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight and that, the published and filed rate, equally known by and available to every shipper.

* * * * * * *

In this act we find punishment by imprisonment abolished and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. * * *

This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered. * * *

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which, or the motive for which, this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

66 In *Hanley v. Kansas City So. Ry. Co.,* 187 U. S., 619, it is said:

The transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

Mr. Justice Harlan, voicing the opinion of the court in *Adair v. U. S.,* decided January 27, 1908, defines commerce as follows, viz:

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have

been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed every species of "commercial intercourse among the several states, but not to that commerce completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co. v. U. S.*, 193 U. S., 197, and authorities there cited.

"If," says Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1–196, "as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

It thus appears that while Congress takes jurisdiction of the matter of interstate commerce under the provisions of the Constitution pertaining thereto, it, in so doing, draws to itself full power to deal with all questions arising in that field, and among others the right to declare what shall be and what shall not be permitted therein, subject only to other constitutional provisions, and so to determine what matters are comprehended within the spirit of the act. It may, therefore, not be said, as an abstract proposition, that in respect to the classes claimed by defendant not to be connected with trade or commerce in any manner, with whom the carrier has no dealings in its common and accepted relation to the public, to use counsel's phrase, that gratuitous service is not commerce in any sense of the term, and not forbidden, either by the letter or the spirit of the Interstate Commerce Act. The statute applies to all acts which directly or indirectly affect interstate commerce. Surely, it can not rest in the volition of the carrier by departing from the published schedules in arbitrary cases, to create a privileged class to which it may with impunity extend discriminating rates. Defendant's contention in this regard is not tenable.

67 There can be no doubt but that it is clearly within the power of Congress to legislate upon the subject-matter here involved and to include the free carriage of goods by an express company for employees of itself, other express companies, and railroad companies, among those acts which are prohibited by the interstate commerce act. The claim on the part of defendant that the granting of the free carriage set out in the pleadings contributes materially toward making its service attractive to employees, resulting in better transportation facilities to the public, and therefore not within the act, even if true, is beside the question before the court. While the constitutionality of the act is not here attacked, yet the defendant

seems to imply that to construe the statute as asked for in the bill would leave it open to that objection. For the reasons and upon the authorities above set out and others not cited, this is not the law. Whether or not a construction of a statute would work inconvenience or affect the efficiency of the thing legislated upon is of no moment, provided Congress has the power to legislate upon the subject-matter. A court might well charge itself with judicial cognizance of the fact that, carried to its logical result, the use of free carriage as a means for bettering the public service would revive the very evils which the statute was designed to remove.

The court is of the opinion that the transactions set out in the pleadings are within the prohibitions of the statute, and that, unless included within the exceptions thereof, they must be held to violate the same.

It is contended for defendant that the term "passes," as used in said amended section 1 of the act of 1887, includes the franks in question, one form of which reads as follows, viz.

1907.

This frank does not cover charges on foreign S. S. lines or to the U. S. Island Possessions.

Wells, Fargo & Company will transport free of charge during the current year over its express line the personal packages of —— —— subject to conditions indorsed hereon.

The conditions indorsed on the back are as follows:

The free transportation hereby granted is complimentary and not transferable, and is applicable only to personal packages of the holder, not the shipments of extra heavy weight or quantity, money, bonds, jewelry, live stock or business consignments.

By accepting and using this frank, the respondent thereby assumes all risk of loss or damage from whatever cause to property carried under same.

When charges are collected upon packages entitled to free transportation, the company's agent will if requested refund same upon presentation of the frank.

The holder of this frank is requested to present it with shipments, when made, or if not practicable to do so to personally mark on the baggage "free frank No. ——," adding his signature. If used at any other place than the residence of the holder, the frank must be presented with the shipment.

68 While on the merits there may be no just reason why express companies should not have the same liberty in respect to the issuance of free transportation of property that railroads have as to persons, it is evident that this section applies in terms solely to the transportation of particular classes of persons. And there can be no doubt that Congress acted within its powers in so doing. As said in *Gibbons v. Ogden, supra,* with reference to interstate commerce:

As has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects.

Its acts with regard to subject-matters over which it has plenary power, unless done in contravention of the Constitution, become the supreme law of the land, nor does there seem to be any limitation upon its power to deal as it may elect with the questions involved in the statute under consideration, even though such action, if taken by a state, would be prohibited as class legislation under the fourteenth amendment to the Constitution. In *Howard v. Illinois Central Railroad, supra,* it was urged that the statute discriminated in favor of the employee and against the employer, "placing all employers who are common carriers in a disfavored and all their employees in a favored class." "But," says the Court, "without, even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act, and not the power to Congress to enact it. We say this, since, in testing the constitutionality of the act, we must confine ourselves to the power to pass it, and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary."

There is no reason for assuming that Congress intended to give other meaning to the terms "pass" and "frank" than those in common acceptation—the one referring only to persons and the other to property, telegrams, and the like. The language of the statute with reference to the filing of and adherence to rates is comprehensive and unequivocal, and, in the absence of the exception of sections 1 and 22, would include the excluded items thereof. By the proviso, certain persons are relieved from the general effect of the act. This is deemed to be the fair meaning thereof, and the rule of construction laid down by Mr. Justice Story in *United States v. Dickson,* 15 Pet., 141–163, is held to apply, viz:

> In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof.

and by Mr. Justice Strong in *Savings Bank v. U. S.,* 19 Wall., 227, 235. "It [the proviso] takes out of the operation of the body of the enactment that which otherwise would be within it; it restrains the generality of the provision." It will be seen from the
69 terms of the frank above set out that it opens a wide field for the evasion of the spirit of the act. It is not even limited to the classes named in the pleadings. This hearing, however, is so limited, and no point is made of this last circumstance. It is broad enough in language to admit of a vast free carriage business, and might well become a potent factor in the securing of business advantages without transgressing the other provisions of the act. Indeed there appears to be no legal or ethical grounds for making any presumptions in its favor, as against the letter of the act as amended.

Section 22 in terms takes from the operation of the act the carriage, storage, and handling of property free or at reduced rates for the United States and state and municipal governments, and for charitable purposes, and carriage to and from fairs and expositions for exhibition thereat and the carriage of certain classes of persons

named therein specifically. Admittedly, the service herein objected to is not mentioned. It is argued for defendant that the language, "Nothing in this act shall prevent," etc., and "nothing in this act shall be construed to prohibit," etc., discloses the intention of Congress to make it known that the excepted persons and property were not to be considered within the statute. In *Interstate Commerce Commission v. B. & O. R. R. Co., supra,* it is said by Mr. Justice Brown: "The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust," and adds:

It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust; in other words, this section is rather illustrative than exclusive. Indeed, many, if not all, of the excepted classes in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination if more favorable terms were extended to them than to ordinary passengers, such, for instance, are property of the United States * * * it does not operate to the prejudice of a single passenger, who can not be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward anyone it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. * * * If these tickets were withdrawn the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing.

As said by counsel for defendant, "the purpose of that statute" (the Elkins Act) "was to prescribe penalties and supply remedies for the better and more effectual enforcement of the interstate commerce act." The amendments of 1906 infuse greater vitality into the act. Furthermore, in the two cases last cited, the transportation was provided in accordance with published rates, and was regarded by the court as a legitimate means to be employed by the carrier
70 & 71 in stimulating the particular kind of carriage embraced within it. There was no deviation from the rates filed with the Interstate Commerce Commission. That Congress might have declared the special party rate illegal, will hardly be controverted. Whether this be so or not, the facts of those cases differ so greatly from those set out in the pleadings herein, and the construction asked to be placed upon them is so at variance with the later decisions of the court and the language of the statute as it now stands, that it is considered that the granting of the free carriage set out in the pleadings, in the manner in which it is granted, is not justified by law, and is in contravention of the statute.

It is undoubtedly true that even in the absence of statutory provision certain free transportation could not be held to be of a discriminatory nature, as, for instance, those persons and that property directly required by the carrier in sustaining its own construction, maintenance, and efficiency. The Interstate Commerce Commission

in a general rule issued October 12, 1906, found in 12 I. C. C. Rep., 11, held as follows:

But the commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing a duty imposed upon, the carrier, nor from giving free carriage over its line to the households and personal effects of an employee who is required to remove from one place to another at the instance of, or in the interest of, the carrier by which he is employed.

Free carriage of persons and property, other than that permitted by the act, and that required solely for the purposes of the carrier and necessary in the performance of its duty to the public is prohibited by the statute. The acts described in the pleadings come within neither of these classes, and are therefore declared to be in violation of the law.

(Endorsed:) Filed April 24, 1908. H. S. Stoddard, Clerk.

72 And on to-wit: the twenty-fourth day of April, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Decree of April 24, 1908.

28728.

UNITED STATES OF AMERICA
vs.
ADAMS EXPRESS COMPANY.

This cause came on to be heard at this Term upon the pleading herein together with the stipulation of facts on file and of record herein and was argued by counsel; and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

That said defendants, its agents, attorneys and all other persons acting under its authority, and each of them, be and they are hereby perpetually enjoined from issuing any frank or other document for the free transportation of property to the following persons, to-wit: the officers, agents, attorneys and employés of said defendant and their respective families; the officers and employés of other express companies and their respective families; the officers and employés of any railroad or any other common carrier subject to the Act to regulate commerce and its amendments and their respective families; or to any of said persons; and from transporting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said Interstate Commerce Act and its amendments.

It is further ordered and adjudged that the plaintiff have and

recover from the defendant its costs of suit to be taxed herein,
73 for which let execution issue.

This decree shall extend only to the transportation of property in interstate and foreign commerce as defined in said Act to regulate commerce and the acts amendatory thereof.

For the purpose of enabling the defendant to issue the necessary instructions to its agents and to call in outstanding franks, it is ordered that this decree shall not become effective until May 10, 1908.

74 And on to-wit: the twenty-fourth day of April, 1908, come the defendant in said entitled cause by its solicitors and filed in the clerk's office of said Court its certain petition for appeal and assignment of errors in words and figures following to-wit:

Petition for Appeal and Assignment of Errors.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

Petition for Appeal and Assignment of Errors.

The defendant prays an appeal to the Supreme Court of the United States from the final decree entered herein, and respectfully submits that the court has erred.

1. In holding that the defendant has committed discriminations forbidden by law.

2. In enjoining the defendant from issuing passes or franks to its officers, agents and employés, and members of their families, for their personal packages.

3. In enjoining the defendant from issuing passes or franks for such packages to the officers, agents and employés of other express companies, and railroad and transportation companies subject to the Act to Regulate Commerce, in exchange for their passes.

4. In construing said Act of Congress as forbidding the issue or interchange of franks or passes as aforesaid.

75 5. In enjoining the defendant from carrying the personal packages of its officers, agents and employés, and members of their families, and the officers, agents and employés of other express companies and common carriers subject to said Act, except on payment of the published tariffs therefor.

6. In entering a decree in favor of the complainant.

7. In not dismissing the petition.

The defendant prays the court to suspend the injunction awarded

by the final decree during the pendency of said appeal in the Supreme Court.

LEWIS CASS LEDYARD,
LAWRENCE MAXWELL, JR.,
Counsel for Defendant.

WINSTON, PAYNE, STRAWN & SHAW,
Solicitors.

(Endorsed:) Filed April 24, 1908, H. S. Stoddard, Clerk.

76 And on the same day to-wit: the twenty-fourth day of April, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of April 24, 1908, *Allowing Appeal.*

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

The appeal as prayed is allowed and the injunction awarded by the final decree is suspended until December 1, 1908, or the further order of the Supreme Court provided the transcript on appeal is filed in the Supreme Court within thirty days from this date, The penalty of the appeal bond is fixed at one thousand dollars.

77 And on to-wit: the fifth day of May, 1908, come the American Express Company and the American Surety Company of New York and filed in the clerk's office of said Court a certain Appeal Bond in the words and figures following to-wit:

Appeal Bond.

Know all men by these presents, that we, American Express Company, and American Surety Company of New York, are held and firmly bound unto United States of America in the full and just sum of one thousand dollars ($1000) to be paid to the said United States of America, its attorneys, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this fifth day of May, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said court between the United States of America, complainant, and American Express Company, defendant, a decree was rendered against the said American Express Company and the

said American Express Company having obtained from said Court an order allowing an appeal to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said Court to reverse the decree of the aforesaid suit.

Now, the condition of the above obligation is such, that if the said American Express Company shall prosecute its said ap-
78 peal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN EXPRESS COMPANY,
By L. M. FARGO,
Vice President & Gen. Manager.
AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. F. SPALDING,
Res. Vice President.

[SEAL.] Attest: KINNEY SMITH, *Res. Ass't Sec'y.*

Sealed and delivered in the presence of

—— ——.

O. K.
R. W. CHILDS,
Ass't U. S. Att'y.

Appvd. May 5, 1908.
KOHLSAAT, *J.*

(Endorsed:) Filed May 5, 1908, H. S. Stoddard, Clerk.

79 And on to-wit: the eighteenth day of May, 1908 there was filed in the clerk's office of said Court in said entitled cause a certain stipulation in words and figures following to-wit.

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28728.

UNITED STATES OF AMERICA
vs.
AMERICAN EXPRESS COMPANY.

It is hereby stipulated that the appeal to the Supreme Court of the United States in the above case was allowed in open Court, and the issuance and service of citation is waived.

EDWIN W. SIMS,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed May 18, 1908, H. S. Stoddard, Clerk.

80 NORTHERN DISTRICT OF ILLINOIS, *Eastern Division, ss:*

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said court in the cause entitled United States of America *vs.* American Express Company, as the same appear from the original records and files of said Court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Chicago, in said District, this 18th day of May, 1908.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

H. S. STODDARD, *Clerk.*

81 Supreme Court of the United States.

No. 785, October Term, 1907.

AMERICAN EXPRESS COMPANY, Appellant,
v.
UNITED STATES OF AMERICA.

Notice for the Purpose of Abridging the Printed Record under Rule 10, Clause 9.

The appellant considers the following portions of the record unnecessary for the consideration of the case on the errors which it has assigned, and it therefore proposes to omit the same in printing the record, to-wit:

Exhibit A, pages 27 to 53, inclusive of the transcript, being the Articles of Association and By-laws of the appellant.

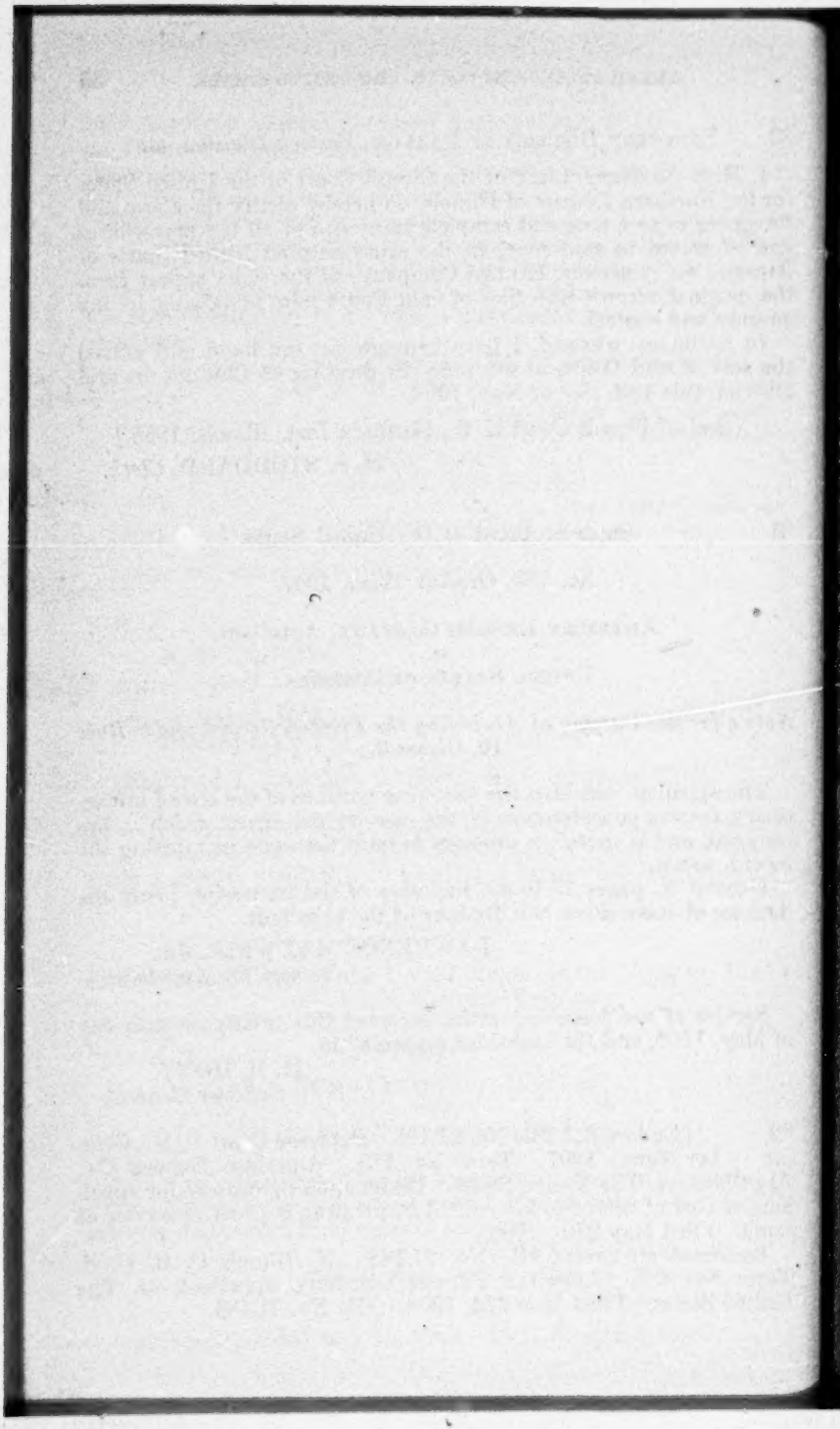
LAWRENCE MAXWELL, JR.,
Counsel for Appellant.

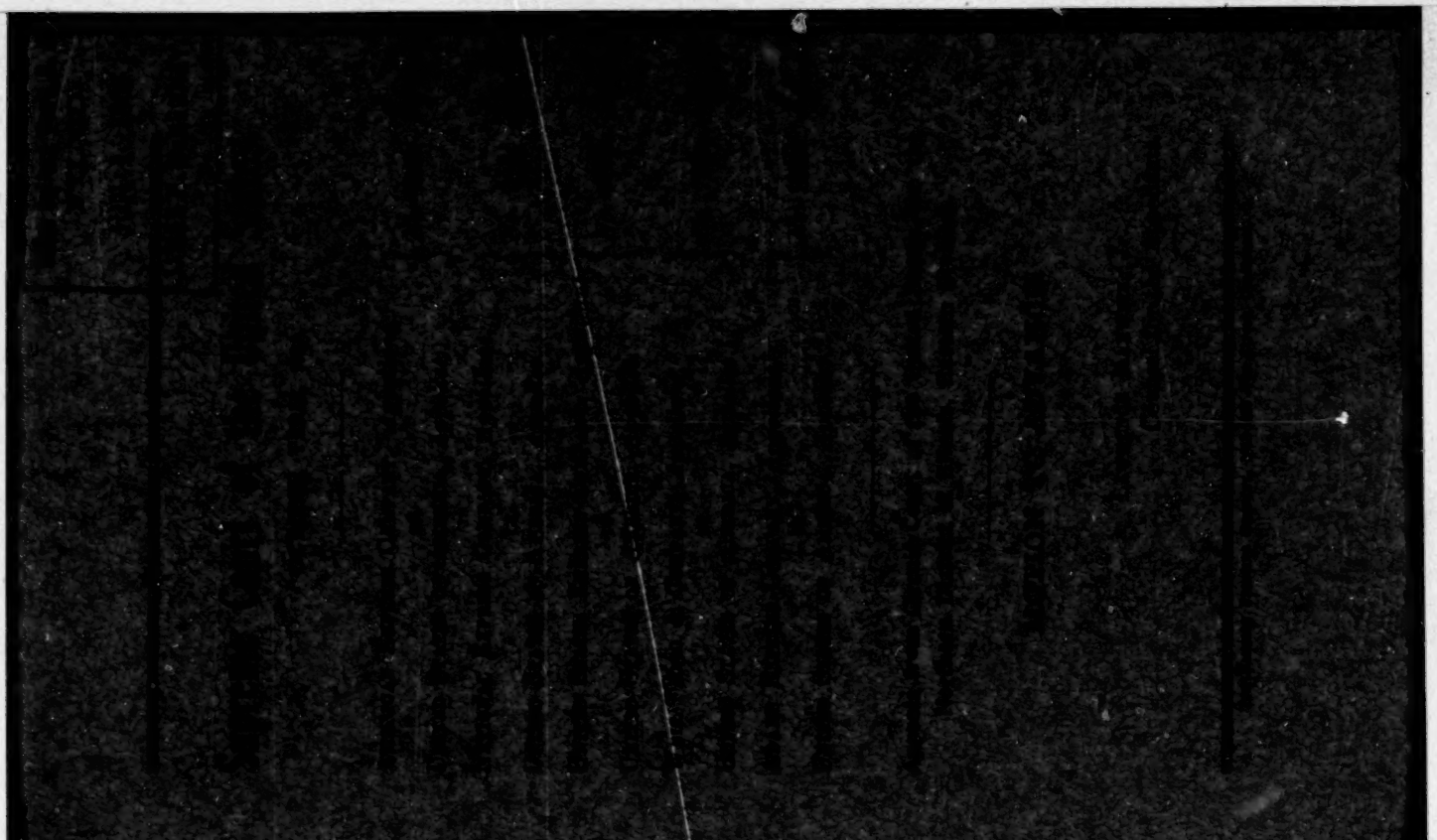
Service of the foregoing notice accepted this twenty seventh day of May, 1908, and the omissions consented to.

H. M. HOYT,
Solicitor General.

82 [Endorsed:] File No. 21,188. Supreme Court U. S. October Term, 1907. Term No. 785. American Express Co., Appellant, *vs.* The United States. Designation by counsel for appellant of part of record to be omitted in printing & proof of service of same. Filed May 27th, 1908.

Endorsed on cover: File No. 21,188. N. Illinois C. C. U. S. Term No. 405. American Express Company, appellant, *vs.* The United States. Filed May 22d, 1908. File No. 21,188.





Supreme Court of the United States.

OCTOBER TERM, 1907.

AMERICAN EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 785.*
NATIONAL EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 786.*
UNITED STATES EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 787.*
WELL FARGO & COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 788.*
ADAMS EXPRESS COMPANY, *Appellant*, *vs.* UNITED STATES OF AMERICA, *Appellee*.	*No. 789.*

Appeals from Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

MOTION TO ADVANCE.

The appellants move to advance the above entitled cases, and to assign them for hearing as one case on as early a day in the next term as may be convenient to the court.

They are suits brought by the Attorney General to enjoin the appellants from issuing express franks to their officers and employes, and members of their families, or to the

officers and employes of other express companies and transportation companies, in exchange for their passes, on the ground that such free transportation is forbidden by the Interstate Commerce Act, as amended June 29, 1906, and by the Elkins Act.

The circuit court, by its final decrees, enjoined the defendants as prayed, but in allowing appeals to this court suspended the operation of the injunctions until December 1, 1908. In view of the limit thus placed upon the orders of suspension, and of the importance of the questions involved, not only to all express companies but to all railroad companies, it is important that the cases be disposed of in this court as early as may be.

This motion is made with the approval of the Solicitor General and in response to the following telegram from him to the United States Attorney who had charge of the cases in the circuit court, viz:

"Please advise counsel for the Express Companies that the Government will consent to an advancement of the case in the Supreme Court for early hearing next term. The motion should be made next Monday, June 1st. Direct counsel's attention to the fact that the operation of the injunction has been suspended by Judge Kohlsaat until December 1st, and that unless they make a motion to advance this case the Government will not consent to a further suspension of the operation of the injunction."

LAWRENCE MAXWELL, Jr.,
Counsel for the Appellants.